Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

OCTOBER 2003 TERM

CHARLES F.G.,
Petitioner

vs.

STATE OF WISCONSIN,
Respondent.

On Petition for Writ of Certiorari to the United States Supreme Court

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PETITION FOR WRIT OF CERTIORARI

Steven J. Meshbesher
Attorney No. 127413
Counsel of Record for Petitioner
MESHBESHER & ASSOCIATES, P.A.
225 Lumber Exchange Building
10 South Fifth Street
Minneapolis, MN 55402
(612) 332-2000

Executeam – 2573 N. Hamline Ave., St. Paul MN 55113 • 800-747-8793 • 651-633-1443

84 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner entitled to have the charges against him dismissed with prejudice after his rights to either due process of law and/or confrontation of witnesses were violated?

PARTIES TO THE PROCEEDING

STEVEN J. MESHBESHER
Attorney at Law
License No. 127413
Meshbesher & Associates
225 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 332-2000

Counsel for Petitioner

PEG LAUTENSCHLAGER
Wisconsin Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857
(608) 266-1221

ANGELA L. HOLMSTROM
Barron County District Attorney
Barron County Courthouse
330 East LaSalle Avenue, Room 206
Barron, WI 54812

Parties Against Whom Relief is Sought

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CITATIONS OF OPINIONS

The opinion of the Wisconsin Court of Appeals, filed August 12, 2003, is unpublished. The order of the Wisconsin Supreme Court denying Petitioner's Petition for Review of Decision of the Court of Appeals dated October 21, 2003.

TABLE OF AUTHORITIES

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393 U.S. 314 (1969) 13, 14

California v. Trombetta,

467 U.S. 479 (1984) 12, 14

Chambers v. Mississippi,

410 U.S. 284 (1973) 13, 14

Pennsylvania v. Ritchie,

480 U.S. 39 (1987) 12, 14

State v. Green,

646 N.W.2d 298 (Wis. 2002) 13

State v. Shiffra, 499 N.W.2d 719

(Wis. Ct. App. 1993) 12, 13, 14

State v. Bauer,

325 N.W.2d 857, 860 (Wis. 1982) 12

BASIS FOR JURISDICTION

IN SUPREME COURT

The decision and Order of the Wisconsin Court of Appeals in this case was filed on August 12, 2003. The Petition for Review of the Decision of the Court of Appeals was denied by the Wisconsin Supreme Court on October 21, 2003. This Court has jurisdiction pursuant to 18 U.S.C. § 3736, Fed. R. Crim. P. 37(b), and Rule 10 of the Rules of the United States Supreme Court.

CONSTITUTIONAL AND

STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process to obtaining witnesses in his favor, and to have assistance of Counsel for his defense."

Fourteenth Amendment to the United States Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On December 8, 2000, three year-old Avanee C.-G. was left in the care of her grandfather, Charles F.G. for a few hours while her mother, Julie G., was working in a liquor store owned by Charles. The next morning, Julie attempted to wipe Avanee's vaginal area with a baby wipe, at which point Avanee "scooted back ... squealed and said it hurt." (Trial Transcript, 3/19/02, pages 118-121).

On January 24 and 25, 2001, approximately six (6) weeks later, Avanee was interviewed by a social worker at the Pierce County Department of Health and Human Services. (Trial Transcript, 3/19/02, pages 141, 143, 149,).

During the second interview on January 25,

2001, after repeated questioning as to whether anyone had touched in vaginal area in a bad way (and after repeatedly denying that anyone had in fact touched her vaginal area), Avanee stated that "Pappa did ... right here." After further questioning into the incident, Avanee stated that "Pappa" touched her in the vaginal area with his hand, "trying to get it out ... my pink button." (Trial Exhibit 2). On March 16, 2001, while at a Day Care Center, Avanee spontaneously informed a day care teacher, that "Poppy hurt me, poppy hurt me..." as she "gestured to her genitals." (Trial Transcript, 3/19/02, pages 156-57, 161, 166). On April 23, 2001, Charles was charged by Complaint with one count of Sexual Assault of a Child Under 13 Years of Age in violation of Wis. Stat. § 948.02(1).

At an August 2, 2001 Motions Hearing, Charles' counsel specifically requested an Order allowing an adverse psychological/mental-health examination of Avanee, an Order allowing Charles access to any and all relevant medical or mental health records of Julie and Avanee, an Order allowing Charles to introduce evidence of Julie's prior allegations of sexual assault, and an Order suppressing statements made by Avanee. (Transcript, 8/2/01, pages 4-6). The motions regarding medical/psychological records, and regarding the adverse psychological examination, were conditionally granted by an Order file August 27, 2001. (Order, 8/27/01, Appendix A). The State of Wisconsin filed a Petition for Leave to Appeal the non-final Order, which Petition was denied on October

17, 2001. (Order, 10/17/01, Appendix B).

At a Motion Hearing held on January 9, 2002, Charles requested that Julie's testimony be suppressed due to her unwillingness to sign authorizations releasing her and Avanee's medical and/or psychological records to the court for an in camera review. (Transcript, 1/09/02, pages 4-5). The Motion was partially granted, and the court ordered that Julie could testify only as to Charles opportunity to have molested Avanee. (Transcript, 1/09/02, pages 6-9, and Order 1/29/02; Appendix C).

A jury trial was held on March 19, 2002, during which Julie testified in direct contradiction to the court's order of January 9, 2002. Charles' counsel moved to dismiss the case with prejudice as jeopardy

had already attached, which motion was denied. (Trial Transcript, 3/19/02, pages 121-123, Appendix D). On March 20, 2002, the jury returned a verdict of guilty. (Trial Transcript, 3/20/02, page 312). On July 9, 2002, Charles was sentenced to 25 years in the Wisconsin prison system, with an initial confinement of 5 years, followed by a term of extended supervision not to exceed 20 years. (Transcript, 7/9/02, pages 37-38; Judgment of Conviction, Appendix E). Charles appealed his conviction on numerous grounds, including the grounds presented in this Petition. On August 12, 2003, the Wisconsin Court of Appeals affirmed the trial court, and denied Charles' prayer for relief on appeal, in all respects. On October 21, 2003, the Wisconsin Supreme Court denied further review of

Charles' case. This Petition follows.

REASONS FOR ALLOWANCE OF WRIT

A defendants' constitutional right to due process encompasses a number of rights including the meaningful opportunity to present a complete defense, and at least a limited right to discover exculpatory evidence. See State v. Shiffra, 499 N.W.2d 719, 721 (Wis. Ct. App. 1993) (citations omitted); also see Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987), and California v. Trombetta, 467 U.S. 479, 485 (1984). Likewise, a defendant's constitutional right to confront witnesses includes the right to cross-examine witnesses, a "primary component" of the right to confrontation, the denial of which "calls into question the ultimate '"integrity of the fact-finding process."'" State v. Bauer, 325 N.W.2d 857, 860 (Wis. 1982);

quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973), quoting Berger v. California, 393 U.S. 314, 315 (1969).

For precisely these reasons, the Wisconsin Supreme Court crafted the rule in State v. Shiffra, whereby a defendant is entitled to discovery of otherwise confidential information upon a preliminary showing of materiality or, if the witness refuses to release the records, is entitled to the total suppression of that witness' testimony. Shiffra, 499 N.W.2d at 725-26; State v. Green, 646 N.W.2d 298, 309 (Wis. 2002). Here, Charles F.G.'s rights to due process and/or confrontation were violated when Julie G. was allowed to testify despite her unwillingness to release certain confidential records, specifically when she

testified in direct violation of the trial court's order limiting her testimony. Charles' due process rights were violated when the court refused to dismiss the case with prejudice, even though the court instructed the jury to disregard Julie's statement.

By ignoring or refusing to apply the rule and remedy crafted in Shiffra, the trial court violated Charles' rights to due process and/or confrontation as guaranteed by the Fifth, Sixth, and Fourteenth amendments to the U.S. Constitution, and as informed by this Court's decisions in Ritchie, Trombetta, Chambers, and Berger as cited above.

APPENDIX

Appendix A: Order of the Barron County District Court, filed August 27, 2001..... A-1

Appendix B: Order of the Wisconsin Court of Appeals, dated October 17, 2001..... A-6

Appendix C: Order of the Barron County District Court, filed January 29, 2002..... A-8

Appendix D: Partial Transcript dated March 19, 2002..... A-10

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STATE OF WISCONSIN CIRCUIT COURT

BARRON COUNTY

STATE OF WISCONSIN,

Plaintiff, ORDER

v. Case No: 01 CF 44

CHARLES GROSKREUTZ, Filed August 27, 2001

Defendant.

Circuit Court, Barron Co., BONITA K. GAGNER, Clerk

This matter came on for hearing on the 2nd day of August, 2001, at 1:00 o'clock p.m. at the Barron County Courthouse, Barron, Wisconsin, the Honorable Eugene D. Harrington, Judge of Circuit Court, presiding. The State of Wisconsin appeared by and through its attorney, Mr. James Babbitt, Assistant District Attorney, Barron County, Wisconsin. Defendant appeared personally and by his attorney, David J. Rice. The matter was heard pursuant to the Motions filed, Pretrial and In Limine by the Defendant.

Based upon the evidence presented, the argument of counsel and all the files, records and proceedings herein, the Court makes the following Order:

1. Defendant's Motion for an Order of the Court suppressing statements made by the Defendant to Investigator Mary Dexter on or about February 6, 2001, is denied. The Court found the statement was voluntarily given

by the Defendant and that he had notified Investigator Dexter that he was willing to speak to her. He was not in custody at the time of the interview and, in fact, the interview was conducted telephonically when he was in the hospital and was, therefore, not in derogation of his rights to the assistance of counsel or his right to remain silent.

2. Defendant's request for an Order allowing an expert named by the Defendant to conduct an independent psychological or other mental health examination of the alleged victim is granted conditionally. Before the Court will allow the Defendant's expert to conduct an examination of the alleged victim, Defendant's expert shall review the documents, video tapes and other materials regarding the investigation, including the medical, mental health, counseling or other records related to the alleged victim. Defendant's expert shall then prepare a conditional report as to his or her findings showing how examination of the alleged victim would be relevant to the case.

3. It is ordered that Defendant and an expert to be named by the Defendant may review and examine an examination medical record or other report concerning the alleged victim prepared by or on behalf of the State, which may be relied upon by the State at the trial and the mother of the alleged victim, Julie Groskreutz, shall sign authorizations

necessary to effectuate this Order.

4. Defendant requested an Order allowing Defendant access to any and all relevant medical, mental health, counseling or other such related records of the alleged victim's mother, Julie Groskreutz. The Court grants this Motion and the State shall prepare the necessary releases for Julie Groskreutz to sign. The State shall then submit the reports or records to the Court for an In Camera review of the same. They shall be sent by certified mail or other secure and confidential means and they shall then be placed under seal for use if necessary in an appeal in this matter. The Court will decide based upon its review of the records whether there is any material or relevant information to be disclosed to the State and the Defense.

5. Defendant requested an Order allowing Defendant access to any and all relevant medical, mental health, counseling and of other such related records of the alleged victim. The Court grants this request and Orders that the mother of the alleged victim, Julie, Groskreutz, shall sign the necessary releases for the release of the same. This grant is conditional as stated above in paragraph 2 for purposes of the review by the expert to be named by the Defense for a conditional report to the Court for the Court's further review.

6. The Defense requested an Order In Limine

allowing the Defendant to introduce evidence of the alleged victim's mother's prior allegations of sexual assault or sexual misconduct against her by others. The Court grants the same. The Court finds that Wisconsin Statute § 972.11 does not apply in that the mother of the alleged victim is not the complaining witness. In any case the Court believes that the exceptions enumerated in the Statute would apply.

7. The Defense requested an Order In Limine clarifying which, if any, of the alleged victim's statements to others regarding the alleged assault will be admitted at trial. The Court finds that this is part of the discovery request and that the State has to this point satisfied the discovery request by the Defense by its submissions to the Defense. Should any additional information be available the State shall provide the same to the Defense pursuant to the previous discovery request and/or Court Order.

8. The Defense requests an Order In Limine for the Defendant to present expert evidence that sexual assault of a child is not consistent with the Defendant's character. The State did not object to the same and the Court, therefore, grants the same.

9. Defense requested an Order of the Court regarding statements made by the alleged victim to other persons, including her mother, Julie Groskreutz, and the

investigators. The State advised that there were only three such statements, including the video tapes made of the alleged victim, the statements to Julie Groskreutz made on or about December 9, 2000, and certain reports of an alleged spontaneous statement by the alleged victim at her daycare. The Court determined that the issue as to the materiality, relevance or other admissability of these statements or other such statements shall be taken up at the time of the trial.

10. The court orders that there shall be a telephone conference between the Court and the parties' attorneys on August 27, 2001 at noon initiated by counsel for the Defendant. The Court also orders that the conditional report of the Defendant's expert as ordered above shall be submitted on or before October 5, 2001.

So Ordered.

Dated this 23 day of August, 2001.

BY THE COURT

/S/

Honorable Eugene D. Harrington
Circuit Court Judge

Approved as to form
This 13th day of August, 2001.

/s/

James Babbitt
Assistant District Attorney
State Bar No.

OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
WEB SITE: www.courts.state.wi.us
DISTRICT III

To: October 17, 2001

Hon. Eugene D. Harrington
Washburn County Courthouse
10 Fourth Avenue
Shell Lake, WI 54871

Bonnie Gagner, Clerk
Barron County Courthouse
330 E. LaSalle Avenue
Barron, WI 54812

James D. Babbitt
Asst. District Attorney
330 E. LaSalle Ave., Room 237
Barron, WI 54812-1583

David J. Rice
Herrick, Hart, Duchemin, Spaeth, Sullivan
116 W. Grand Ave., P.O. Box 167
Eau Claire, WI 54702

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

01-2490-CRLV

State v. Charles F. Groskreutz (L.C. #01-CF-44)

Before Cane, C.J., Hoover, P.J., and Peterson, J.

The State has filed a petition for leave to appeal an order conditionally granting Charles Groskreutz's request for an adverse psychological examination of the complaining witness, granting Groskreutz's request for in-camera examination of medical records of the child's mother and granting Groskreutz's request to present evidence of the mother's alleged prior false allegations of sexual assault. The harm identified by the State on the first two issues is at this point only anticipatory. We conclude that the petition does not establish that granting interlocutory appeal would accomplish any of the purposes set out in Wis. STAT. § 808.03(2).

IT IS ORDERED that the petition is denied.

Cornelia G. Clark
Clerk of Court ofAppeals

STATE OF WISCONSIN

CIRCUIT COURT

BARRON COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

CHARLES GROSKREUTZ,

Defendant.

ORDER

Case No.: 01 CF 44

Filed January 29, 2002

This matter came on for hearing on the 9th day of January, 2002, at 1:30 o'clock p.m. at the Barron County Courthouse, Barron, Wisconsin, the Honorable Eugene D. Harrington presiding. The State of Wisconsin was represented by Mr. James Babbitt, Assistant District Attorney, Barron County, Wisconsin. Mr. Groskreutz was present in person and with his attorney, David J. Rice. The matter was heard pursuant to the Motion In Limine filed by the Defendant.

Based on the argument of counsel and all the files, records and proceedings herein, the Court makes the following Order:

1. The Court grants the Defendant's Motion in Limine on a limited basis, limiting the testimony of Julie Groskreutz so that she may not testify about any conversation she may have had with the alleged victim, Avanee Groskreutz, that relates to the relationship between the alleged victim,

Avanee Groskreutz, and the Defendant as to the underlying allegations of sexual assault by the Defendant against Avanee Groskreutz.

However, the Court does rule that the State may use Julie Groskreutz for purposes of testimony as to opportunity of contact between the Defendant and the alleged victim, Avanee Groskreutz.

2. The Court orders that the defense shall name its experts to the prosecution relating to the expert's opinion as to whether Defendant may or may not fit the profile of a sexual offender, to be named on or before February 1, 2002. Otherwise each party shall disclose to the other its witnesses by February 15, 2002.

SO ORDERED.
Dated this 25 day of January, 2002.
BY THE COURT
/s/
Honorable Eugene D. Harrington
Circuit Court Judge

Approve as to form
this 17th day of January, 2002.

James Babbit
Assistant District Attorney
State Bar No. 01009761

COPY

STATE OF WISCONSIN CIRCUIT COURT

BARRON COUNTY

State of Wisconsin,	) TRANSCRIPT OF
Plaintiff,	) PROCEEDINGS
vs.	) Jury Trial - Day One
Charles Groskreutz,	)
Defendant.	) Case No. 01 CF 44

The above-entitled matter came duly on for hearing before the Honorable Eugene D. Harrington, Circuit Judge for Washburn County, on March 19, 2002, at the Barron County Courthouse, Barron, Wisconsin.

Before and reported by Karlye A. Canfield, Registered Professional Reporter, Certified Merit and Realtime Reporter, Notary Public for the State of Wisconsin.

REALTIME COMPUTER TRANSLATION

APPEARANCES:

JAMES BABBITT, Assistant District Attorney, Courthouse, Barron, WI, appearing for and on behalf of the

State.

DAVID RICE, Attorney at Law, PO Box 167, Eau Claire, WI, appearing for and on behalf of the Defendant.

Defendant appearing in person.

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1. JULIE GROSKREUTZ

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ReExam by Babbitt-130	ReExam by Rice-132

2. DANIELLE FOLZ

Direct by Babbitt-134	Cross by Rice-137

3. TIMOTHY MARKGRAF

Direct by Babbitt-140	Cross by Rice-150
ReExam by Babbitt-154	

4. RUSSELL ENGLER

Direct by Babbitt-156	Cross by Rice-172

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WITNESSES FOR THE DEFENDANT:

1 RAY VANGILDER Direct by Rice-175

2 SHAWN CROTTEAU Direct by Rice-179

3 JAMES CROTTEAU Direct by Rice-182

4 WANDA GROSKREUTZ

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ReExam by Rice-193

5 DR. HARLAN HEINZ

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A It was probably quarter after 9 in the evening.

Q That same Friday?

A Yeah.

Q Was Avie awake or asleep at that point:

A She was awake.

Q And about what time did she go to bed?

A I honestly couldn't tell you. She was still up and running around. I don't know, probably about 10 or 10:30.

Q Let's talk about the next day, December 9. You woke up at some point?

A Yeah.

Q Avie got up?

A Um-hum (Indicating affirmative), yes.

Q You have to say Yes or No so the reporter can write that down.

A Sorry.

Q The defendant was off at the liquor store already working?

A Yes.

Q At some point did you go -- and this can be answered yes or no -- did you go to wipe Avie with a baby wipe?

A Yes.

Q And were you going to wipe her vaginal area?

A Yes.

Q Now, I don't want you to get into what she said, but can you tell me how she reacted when you went to do that?

A She was laying down and she had scooted back and she squealed and said it hurt.

MR. RICE: Objection, Your Honor.

THE COURT: Sustained.

MR. RICE: Ask it be stricken.

THE COURT: The jury is instructed to disregard what the child said.

BY MR. BABBITT:

Q Keeping in mind we can't get into, for legal, technical reasons, we can't get into what Avie told you. We simply need to focus on what she did. Okay. You went to wipe her vaginal area with a baby wipe and she pulled away?

A Um-hum, yes.

Q Had she done that before?

A Not usually, no.

THE COURT: Let's take a short recess with the witness in the chambers.

(Discussion held in chambers as follows:)

(The record was read by the reporter)

THE COURT: We're outside the presence of the

jury. The defendant is here, both counsel are here, and Ms. Groskreutz is here. The court called us back here for one reason. Ms. Groskreutz, you need to be very careful. Just answer the questions. We have to follow the rules of evidence. We must do that and you must strictly adhere to just answering the lawyers' questions. If you blurt something out, we could taint the jury, and I want to tell you something about the law. If there is a mistrial at this juncture because of something that you say, I have to dismiss the case with prejudice because jeopardy has now attached. So if you make a mistake, this jury is going to be dismissed and in your view, the facts will not be heard. Do you understand the gravity of what we're here for?

THE WITNESS: So why was that, though?

THE COURT: Because the law prohibits you from telling the jury what your daughter said to you on that specific day. That's what the rules of evidence are. That's nothing that Mr. Rice or Mr. Babbitt can change or I can change. That's how the law is. You must just answer the question. I do not want to intimidate you, that's not why I'm here. I just want you to understand that we're really on some fine, thin ice here. All right?

THE WITNESS: Yeah.

THE COURT: You'll do that for us. Thank you

very much.

MR. RICE: I guess at this point, move for a mistrial. She did state a statement from Avie that it hurt, in clear contradiction to the court's order, so I guess I would move for a mistrial.

THE COURT: The motion for mistrial is denied. The response was spontaneous. It wasn't of such a nature as to impugn the defendant's -- or convey the message that the defendant caused the pain. It's just that it hurt. And that answer to that question and given the nature of this circumstance, that's why we're here because the court is concerned that Ms. Groskreutz must understand the gravity of the circumstance and the rule. All right. Motion is denied.

(Return to open court)

BY MR. BABBITT:

STATE OF WISCONSON CIRCUIT COURT

BARRON COUNTY

State of Wisconsin vs. Charles F. Groskreutz

JUDGMENT OF CONVICTION

Date of Birth: Sentence to Wisconsin State

02-09-1955 Prisons and Extended Supervision

Filed July 10, 2002 Case No.: 2001CF000044

The defendant was found guilty of the following crime(s):

Description 1st Degree Sexual Assault of Child

Violation 948.02(1)

Plea Not Guilty

Severity Felony B

Date(s) Committed on or about Fri, 12-8-00

Trial To Jury

Date(s) Convicted 03-20-2002

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct. 1

Sent. Date 07-09-2002

Sentence State Prison

Length 25 YR

Concurrent with/Consecutive to/Comments Initial Confinement is Five (5) years. Twenty (20) years to be served

on Extended Supervision. Dodge Reception Center

Agency

Extended Supervision

Count 1

Begin Date

Length

Comments 20 YR

Conditions of Extended Supervision:

Obligations (Total amounts only)

Fine

Court Costs 20.00

Attorney Fees

Restitution

Other

Mandatory Victim/Wit. Surcharge 70.00

5% Rest. Surcharge

DNA Anal. Surcharge 250.00

Ct. 1

Condition Costs

Ct. 1

Prohibitions Defendant must not consume/possesses any alcoholic beverages. Defendant must not enter any taverns.

Defendant must not have any contact with the victim. Defendant must not have any contact with any children under the age of 18 without prior agent approval. Defendant not to develop any relationships with adults who have female children under the age of 18.

Ct. 1

Other Defendant must comply with Sex Offender Registration. Defendant must submit to DNA testing. Defendant must complete Sex Offender Evaluation/ Assessment. Defendant must comply with Sex Offender Treatment. Defendant is responsible for all costs of the sex offender evaluation and counseling. Defendant must also pay all Court obligations and supervision fees.

COURT OF APPEALS DECISION

DATED AND FILED AUGUST 12, 2003

Cornelia G. Clark

Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. No. 01-CF-44

Appeal No. 02-2350-CR

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES F. G.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Barron County: EUGENE D. HARRINGTON, Judge.

Affirmed.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Charles F. G. appeals a judgment, entered upon a jury's verdict, convicting him of first-degree sexual assault of a child contrary to WIS. STAT. § 948.02(1).[1] Charles argues the trial court erred by: (1) admitting statements the child made to a day-care teacher; (2) failing to enforce its pretrial orders compelling discovery; and (3) refusing to grant a mistrial. Charles also claims the evidence at trial was insufficient to support his conviction and the trial court erroneously exercised its sentencing discretion. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 In April 2001, the State charged Charles with sexual assault of a child, arising from allegations that Charles had sexual contact with his then three-year-old granddaughter, Avanee C.-G. The complaint alleged that on the evening of December 8, 2000, Avanee's mother, Julie G., left Avanee in Charles's care for a few hours. The next morning, Avanee scooted back, squealed and said it hurt when Julie attempted to wipe Avanee's vaginal area with a baby wipe. Julie reported

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

that when she asked Avanee why it hurt, Avanee responded, "Because Poppa touched me with his finger." Julie further reported that "Poppa" was the name Avanee used for Charles. In January 2001, a social worker interviewed Avanee regarding whether anyone had touched her vaginal area "in a bad way." After initially denying anyone had touched her, Avanee stated "Poppa did ... right here." After further questioning, Avanee stated that "Poppa" had touched her in the vaginal area with his hand, "trying to get it out ... my pink button." Likewise, in March 2001, a day-care teacher reported that Avanee had stated "Poppy hurt me," as she gestured to her genitals.

¶3 Charles subsequently filed motions in limine requesting an adverse psychological examination of Avanee as well as relevant medical and mental health records of both Julie and Avanee. Charles also sought to suppress Avanee's statements and introduce evidence of Julie's prior allegations of sexual assault. The trial court conditionally granted Charles's request for an adverse psychological examination of Avanee. The court also granted Charles's motion to introduce evidence of Julie's prior sexual assault allegations and determined that any issues regarding the materiality, relevance or admissibility of Avanee's statements would be addressed at trial. With respect to his request for relevant medical and

mental health records, the court granted the request indicating that Julie should sign the authorizations necessary for it to conduct an *in camera* review of the records.

¶4 After Julie refused to sign the authorizations, the court sanctioned Julie by limiting her trial testimony. At trial, Charles moved to dismiss the case with prejudice, based on his belief that Julie had testified in direct contradiction to the court's order. The motion was denied. Charles was ultimately convicted upon the jury's verdict and sentenced to five years' initial confinement followed by twenty years' extended supervision out of a maximum possible sixty-year sentence. This appeals follows.

ANALYSIS

A. Admissibility of Avanee's Statement

¶5 Charles argues the trial court erroneously exercised its discretion by admitting Avanee's statement to her day-care teacher as an excited utterance under WIS. STAT. RULE 908.03(2). A trial court's decision to admit evidence under one of the exceptions to the rule against hearsay is a discretionary determination that we will uphold if the trial court has reasonably applied the facts to the governing legal principles. ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

¶6 There are three factors that must be considered in determining whether a statement falls under WIS. STAT. RULE 908.03(2): (1) there must be a startling event or condition; (2) the out-of-court statement must relate to that startling event or condition; and (3) the out-of-court declarant must still be under the stress of excitement caused by the event or condition when he or she makes the out-of-court statement. ***State v. Huntington***, 216 Wis. 2d 671, 682, 575 N.W.2d 268 (1998).

¶7 Here, Avanee's statement was made to her day-care teacher approximately fourteen weeks after the sexual abuse incident. Avanee's teacher, Russell Engler, put on some music to help the children wake up from their naps. Engler noticed that the voice on the song entitled "My Grampa" sounded like Avanee's voice. When Engler told Avanee the voice sounded like hers, she responded, "Poppy hurt me, my Poppy hurt me here" while gesturing to her genitals.

¶8 With respect to the first two factors, her grandfather's touching her genital area was a startling event and her statement to Engler related to that event. Citing the fourteen-week lapse in time between the startling event and the statement, Charles argues, however, that Avanee was no longer under the stress of excitement caused by the event or condition

when she made her statement. Although fourteen weeks is a considerable time, our supreme court has refused to adopt a bright-line rule for determining what time lapse will disqualify a statement from being treated as an excited utterance. ***Id.*** at 684-85.

¶9 In ***State v. Lindner***, 142 Wis. 2d 783, 794, 419 N.W.2d 352 (Ct. App. 1987), this court concluded that statements made by a mildly retarded ten-year-old girl to her teacher were "sufficiently spontaneous," despite a three-week lapse between the startling event and the statement. In ***Lindner***, the child's statements were triggered by the school's showing a film designed to encourage children to report sexual abuse. ***Id.*** at 786. As in ***Lindner***, the song "My Grampa" triggered Avanee's statement. We therefore conclude the trial court properly exercised its discretion by determining that Avanee was still under the stress of excitement caused by the touching when she made her statement.

¶10 Alternatively, we conclude the statement was admissible under the residual hearsay exception found in WIS. STAT. § 908.03(24). This exception allows the admission of hearsay not specifically covered by any enumerated exception as long as the statement has "circumstantial guarantees of trustworthiness" that are comparable to those possessed by

hearsay falling within a specific exception. *See* ***State v. Jenkins***, 168 Wis. 2d 175, 191, 483 N.W.2d 262 (Ct. App. 1992). Statements by children about recent sexual assaults may be admissible under the residual hearsay exception in § 908.03(24). ***State v. Sorenson***, 143 Wis. 2d 226, 421 N.W.2d 77 (1988). The court weighing the admissibility of these statements should consider the following five factors:

> First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.
>
> Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statement's trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.
>
> Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.
>
> Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or

> falsity and whether the statement reveals a knowledge of matters not ordinarily attributable to a child of similar age.
>
> Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement.

Id. at 245-46. The ***Sorenson*** court added that "[t]he weight accorded to each factor may vary given the circumstances unique to each case [and] no single factor [is] dispositive of a statement's trustworthiness." ***Id.*** A court must evaluate the force and totality of all these factors to determine if the statement possesses the requisite "circumstantial guarantees of trustworthiness" required by § 908.03(24). *See* ***id.***

¶11 We conclude that Avanee's statement was admissible under this standard because there is ample evidence of the statement's reliability. Engler had no motive to fabricate or distort Avanee's statement nor the circumstances under which the statement was made. Although fourteen weeks separated the assault from the statement, Avanee's statement was made spontaneously in reaction to being told the voice in the song "My Grampa" sounded like hers. The statement's content reveals no sign of deceit or falsity and, in any event,

there was corroborating evidence consistent with the assertions made in the statement. Although Avanee's age limited her ability to communicate verbally, the statement nevertheless had sufficient indicia of reliability, thus making it admissible under the residual hearsay exception.

B. Discovery

¶12 Charles contends the trial court erred by failing to enforce its pretrial order entitling him to an in camera review of Julie's psychological and medical records. At the time of the hearing on Charles's motion, the controlling case on this issue was ***State v. Shiffra***, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993), as clarified by ***State v. Munoz***, 200 Wis. 2d 391, 546 N.W.2d 570 (Ct. App. 1996). Under ***Shiffra***, a defendant must make a preliminary showing that the sought-after evidence is relevant and may be necessary to a fair determination of guilt or innocence. See ***Munoz***, 200 Wis. 2d at 396-98.

¶13 Within a year after the hearing, however, our supreme court set forth the applicable standard applied when a defendant seeks an *in camera* review of privileged records. In ***State v. Green***, 2002 WI 68, ¶34, 253 Wis. 2d 356, 646 N.W.2d 298, the court raised the bar slightly, holding that "the preliminary showing for an *in camera* review requires a

defendant to set forth, in good faith, a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence available to the defendant." Whether a defendant made the preliminary evidentiary showing necessary for an *in camera* review of a victim's privileged records is a question of law that we review independently. ***Id.*** at ¶20.

¶14 Here, Charles's request was based on information that Julie had attempted suicide on three occasions, twice accused men of sexually assaulting her and admitted hostility toward men, specifically Charles. We conclude that Charles failed to make the threshold showing of materiality required by ***Shiffra***. That Julie attempted suicide and had a hostile relationship with Charles does not establish an inability on her part to relay truthful information or recount events. Moreover, with respect to the fact that Julie had twice accused other men of sexually assaulting her, the trial court granted Charles's motion to introduce evidence of those allegations. As the State points out, there was no reasonable likelihood that Julie's records contained information relevant to a fair determination of Charles's guilt or innocence, particularly since Julie was neither the victim of the crime nor an eyewitness

thereto.

¶15 Likewise under the slightly more stringent standard set forth in ***Green***, Charles has failed to show he was entitled to an *in camera* review of the privileged records. The information Charles sought from these records was cumulative to what he already knew about Julie's mental health problems. Charles and Julie's mother, Wanda G., knew about her suicide attempts, her hostile relationship with Charles and her prior allegations of sexual assault. We therefore conclude the trial court erred by concluding Charles was entitled to an in camera review of these privileged records.[2]

¶16 Charles also claims he was entitled to an adverse psychological examination of Avanee. The trial court conditionally granted Charles's request, noting:

> Before the Court will allow the Defendant's expert to conduct an examination of the alleged victim, Defendant's expert shall review the documents, video, tapes and other materials regarding the investigation, including the medical, mental health, counseling or other records related to the alleged victim. Defendant's

---

[2] The court imposed a sanction against Julie for refusing to authorize disclosure of her records. Because Charles was not entitled to an *in camera* review of Julie's records, Charles got more than he was entitled to when the court forbid Julie from testifying about conversations she had with Avanee regarding the sexual assault.

> expert shall then prepare a conditional report as to his or her findings showing how examination of the alleged victim would be relevant to the case.

Charles does not dispute that he failed to satisfy the prerequisites for subjecting Avanee to an adverse psychological examination. The defense expert, Dr. Harlan Heinz, did not prepare a "conditional report" showing how Avanee's examination would be relevant to the case. Because Charles failed to fulfill the conditions established by the trial court, he has waived the right to now claim he was entitled to the examination.

C. Mistrial

¶17 Charles argues the trial court erred by refusing to grant a mistrial after Julie testified in violation of the pretrial order restricting her testimony. As we concluded above, Charles was not entitled to an *in camera* review of Julie's records and thus received more than he was entitled to when the court forbid Julie from testifying about conversations she had with Avanee regarding the sexual assault. *See* supra ¶15. Even, however, were we to assume the trial court correctly restricted Julie's testimony, we conclude the trial court properly exercised its discretion by denying the mistrial motion.

¶18 Whether to grant a mistrial is within the trial court's discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). The trial court must assess, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *See* ***id***. We will uphold the trial court's discretionary decision if it examined the relevant facts, applied a proper legal standard and employed a rational decision-making process. *See* ***id***. at 506-07. Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives to address the claimed error. ***State v. Adams***, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶19 Here, the trial court sanctioned Julie for refusing to authorize release of her medical records. The court limited her trial testimony, indicating "that she may not testify about any conversation she may have had with [Avanee] that relates to the relationship between [Avanee] and [Charles] as to the underlying allegations of sexual assault by [Charles] against Avanee." At trial, the following exchange occurred:

> [Prosecutor]: At some point did you go - and this can be answered yes or no - did you go to wipe [Avanee] with a baby wipe?
> [Julie]: Yes.
> [Prosecutor]: And were you going to wipe her vaginal

area?
[Julie]: Yes.
[Prosecutor]: Now, I don't want you to get into what she said, but can you tell me how she reacted when you went to do that?
[Julie]: She was laying down and she had scooted back and she squealed and said it hurt.

Defense counsel's immediate objection was sustained and the trial court instructed the jury to "disregard what the child said." During a subsequent recess, the trial court additionally admonished Julie to simply answer the questions asked. Defense counsel nevertheless moved for a mistrial arguing Julie had violated the court's order when she testified that Avanee said "it hurt." The trial court denied the mistrial motion stating: "The response was spontaneous. It wasn't of such a nature as to ... convey a message that the defendant caused the pain. It's just that it hurt."

¶20 As the court noted, Avanee's statement that "it hurt" did not convey a message that Charles caused the pain. In any event, the trial court gave a curative instruction to the jury to disregard what the child said. We presume that the jurors acted in accordance with this instruction. ***State v. Edwardsen***, 146 Wis. 2d 198, 210, 430 N.W.2d 604 (Ct. App. 1988). These steps were sufficient to address any potential prejudice. *See*

State v. Collier, 220 Wis. 2d 825, 837, 584 N.W.2d 689 (Ct. App. 1998) ("Potential prejudice is presumptively erased when admonitory instructions are properly given by a trial court."). The drastic remedy of a mistrial was not necessary.

D. Sufficiency of Evidence

¶21 Charles argues that the evidence at trial was insufficient to support his conviction for first-degree sexual assault of a child. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Charles's conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507. It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App.

1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

¶22 Here, in order to find Charles guilty of first-degree sexual assault of a child, the State had to prove beyond a reasonable doubt that Charles had sexual contact with Avanee for the purpose of becoming sexually aroused or gratified. Charles argues that without any evidence to show that he would be sexually aroused by young children, the jury's verdict was based on a presumption and was thus insufficient to prove guilt beyond a reasonable doubt. The trier of fact, however, is free to choose among conflicting inferences of the evidence, and intent, including the intent to become sexually aroused or gratified, can be inferred from the conduct of the accused. ***State v. Drusch***, 139 Wis. 2d 312, 326, 407 N.W.2d 328 (Ct. App. 1987).

¶23 In ***State v. Shanks***, 2002 WI App 93, 253 Wis. 2d 600, 644 N.W.2d 275, this court concluded that, "Intent to become sexually aroused or gratified can be inferred when a man places his finger in the vagina of a two-year-old girl." ***Id.*** at ¶26. The jury saw social worker Timothy Markgraf's

interview with Avanee in which she reported "Poppa" touched her between her legs with his hand. During the interview, Avanee also used gestures to explain that her underpants were down near her ankles when this occurred. The jury could infer that Charles had inserted his finger in Avanee's vagina based on her statement to the day-care teacher and her response to Markgraf that Charles was trying to "dig out" a pink button from her vaginal area. We conclude there was sufficient evidence to support Charles's conviction.

E. Sentencing Discretion

¶24 Sentencing lies within the discretion of the circuit court. *See* ***State v. Echols***, 175 Wis. 2d 653, 681, 499 N.W.2d 631 (1993). In reviewing a sentence, this court is limited to determining whether there was an erroneous exercise of discretion. *See* ***id.*** There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably. *See* ***id.*** at 681-82.

¶25 If the record contains evidence that the circuit court properly exercised its discretion, we must affirm. *See* ***State v. Cooper***, 117 Wis. 2d 30, 40, 344 N.W.2d 194 (Ct. App. 1983). Proper sentencing discretion is demonstrated if the record shows that the court "examined the facts and stated its

reasons for the sentence imposed, 'using a demonstrated rational process.'" ***State v. Spears***, 147 Wis. 2d 429, 447, 433 N.W.2d 595 (Ct. App. 1988) (citation omitted). "To overturn a sentence, a defendant must show some unreasonable or unjustified basis for the sentence in the record." ***Cooper***, 117 Wis. 2d at 40.

¶26 The three primary factors that a sentencing court must address are: (1) the gravity of the offense; (2) the character and rehabilitative needs of the offender; and (3) the need for protection of the public. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The weight to be given each of the primary factors is within the discretion of the sentencing court and the sentence may be based on any or all of the three primary factors after all relevant factors have been considered. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984). When a defendant argues that his or her sentence is unduly harsh or excessive, we will hold that the sentencing court erroneously exercised its discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

¶27 Here, the trial court considered the seriousness of the offense in light of Avanee's age and her relationship to Charles. The court also addressed Charles's character, noting that Charles was supposed to be caring for Avanee when he assaulted her. The court also believed Charles was in danger of reoffending, given his refusal to accept responsibility for his actions. Charles thus argues that the court ignored an independent presentence investigation report and psychological evaluation that concluded he was not a danger to the public or otherwise likely to reoffend. The trial court, however, was not bound by these opinions and likely assessed Charles's risk of reoffense based on Charles's trial testimony and the recommendation of the PSI prepared for the court. The trial court considered the proper sentencing factors and imposed a sentence authorized by law. Under these circumstances, it cannot reasonably be argued that Charles's sentence is so excessive as to shock public sentiment. *See* ***id.*** at 185. We therefore conclude the circuit court properly exercised its sentencing discretion.

By the Court.-Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

OFFICE OF THE CLERK
SUPREME COURT OF WISCONSIN
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688
TELEPHONE (608) 266-1880
FASCIMILE (608) 267-0640
WEB SITE: www.wicourts.gov

To: October 21, 2003

Hon. Eugene D. Harrington
Barron County Circuit Court
P.O. Box 458
Shell Lake, WI 54871-0458

Judith Wells Espeseth
Barron County Clerk of Court
330 E. LaSalle Avenue
Barron, WI 54812

James D. Babbitt
Asst. District Attorney
330 E. LaSalle Ave., Room 237
Barron, WI 54812-1583

Marguerite M. Moeller
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Steven J. Meshbesher
Meshbesher & Associates, P.A.
10 S 5th St., 225 Lumber Exchange Bldg
Minneapolis, MN 55402

You are hereby notified that the Court has entered the following order:

No. 02-2350-CR State v. Charles F.G. L.C.#01CF44

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-respondent-petitioner, Charles F.G., and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark

Clerk of Supreme Court

STATE OF WISCONSIN | CIRCUIT COURT
BARRON COUNTY

State of Wisconsin,	)	TRANSCRIPT OF
Plaintiff,	)	PROCEEDINGS
vs.	)	Motion Hearing
Charles Groskreutz,	)	
Defendant.	)	Case No. 01 CF 44

The above-entitled matter came duly on for hearing before the Honorable Eugene D. Harrington, Circuit Judge for Washburn County, on August 2, 2001, at the Barron County Courthouse, Barron, Wiscsonsin.

Before and reported by Karlye A. Mule, Registered Professional Reporter, Certified Merit and Realtime Reporter, Notary Public for the State of Wisconsin.

REALTIME COMPUTER TRANSLATION

APPEARANCES:

JAMES BABBITT, Assistant District Attorney, Barron County Courthouse, Barron, WI, appearing for and on behalf of the State.

DAVID RICE, Attorney at Law, PO Box 167, Eau

Claire, WI, appearing for and on behalf of the defendant;

Defendant appearing in person.

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(Proceedings held as follows:)

THE COURT: All right. This is State vs. Charles Groskreutz, G R O S K R E U T Z, 01 CF 44. Mr. Groskreutz is here with Mr. Rice. Mr. Babbitt represents the state of Wisconsin. This is the time scheduled for defendant's motion.

Mr. Rice, are you ready to proceed, sir?

MR. RICE: I am, Your Honor.

THE COURT: Proceed.

MR. RICE: I have actually nine different requests of the court for relief, Your Honor. I'm not sure how the court wants to proceed in terms of sequence here. I do have my client who I would like to call. I also have Wanda Groskreutz and Julie Groskreutz under subpoena to testify about some of the motions.

THE COURT: Essentially what you want me to do is permit the defendant to introduce evidence of prior allegations of sexual assault, correct?

MR. RICE: Well, that's correct, Your Honor. There is information regarding Julie Groskreutz accusing on at least two occasions men of having sexually assaulted her. I have an affidavit in the file regarding those allegations, two affidavits regarding those allegations.

We're also asking the court to allow us to have our own expert both evaluate the victim here and also evaluate the, I guess, the interview of the victim that was taken by the state.

The, partly I guess it depends on how the state's going to proceed here. If Mr. Babbitt intends to introduce expert evidence about the victim and her actions and what she has to say, her age appropriateness and her ability to understand, is

she behaving like a victim or not, that kind of expert testimony --

THE COURT: Is her conduct consistent with the conduct of a sexual assault victim?

MR. RICE: That sort of information. If Mr. Babbitt intends to introduce things like that, I think we are entitled to have our own victim, I'm sorry, our own expert also examine the victim and respond and also testify about that. We would also like access to the victim's medical records.

Again, in my motion I've indicated that we understand the victim sometime prior to this alleged assault was having urinary tract infections, was catheterized, and we would like to see that information. We also understand she was examined by doctor sometime, I believe, in February of this year about this patient. So we would like access to those medical records.

We are also asking that the court do an in camera inspection of Julie Groskreutz's counseling records, medical records. And again, the information we have is that she's had a number of suicide attempts, herself. She's had these allegations of sexual assault she's made. She's made it clear to the investigator on the record here that she has a bias or hostility towards men. And based on that, we would like at least the court to examine her records, see if there is anything in there

that might be exculpatory or explanatory of this whole circumstance.

So again, those are kind of our main concerns here. And I can call both Wanda and Julie Groskreutz to testify about some of this background information.

THE COURT: All right. Mr. Babbitt, is there, of the nine items listed on the defendant's pre-trial motion and motion in limine, are there any of those that you concede?

evidence other than vouching or just an attack on the credibility of the victim.

MR. RICE: My thought is, Your Honor, this relates to actually numbers 3 and 5, we'd ask for the expert to have access to, I guess in this case the tape and also 5, for access to relevant medical and mental health counseling and records.

Now, I know the victim has been seeing at least one counselor. If what we're doing is sort of an initial paper review to check on the reliability and relevance, if we can have access I guess to the medical records of the victim, counseling records, sort through that whole panoply of the documents relating to the victim, an expert could look at those and maybe do a paper review.

THE COURT: All right. For the record, 2 is

conditionally granted. Let's move on to 3. Mr. Babbitt.

MR. BABBITT: Your Honor, I will ask the victim's mother to sign a medical release for medical records. I t[illegible] I can concede 3 as well.

THE COURT: All right. 3 is conceded. All right.

4, Mr. Rice, alleged victim's mother. How is the alleged victim's mother's mental health status, it's relevant but does the prejudice far outweigh the relevance? Prejudice far outweigh probative value?

MR. RICE: This is a tougher call, I admit, Your Honor. Basically, it's our understanding, my understanding from my client, from the records I received, that Julie Groskreutz has had quite a troubled youth. She is I think only 21 at this point roughly. In the information we have it's conceded by her mother that she's had three suicide attempts. The record we have indicates that on two occasions she has accused men of sexually assaulting her. One of the men was my client's former brother-in-law and also another young man called Sean Worman which we have submitted as part of our record here.

Again, in the documentations it's indicated by Wanda Groskreutz, it's admitted by Julie Groskreutz, and it's been

asserted by my client that all along Julie Groskreutz has had, I guess, hostility or a distant, tense relationship with my client. At the preliminary hearing in response to a couple of my questions she admitted she hadn't been comfortable leaving Avanee with my client at the time he took her to babysit on this occasion. And I asked her -- she said that she didn't feel comfortable with leaving Avanee with any man -- I asked her: Even the father? And she said: Yes, even the father.

So the background we have here, Your Honor, the extensive background, I can put Wanda and Julie on to testify about that, is the troubled youth, suicide statements, allegations of sexual assault by Julie against her that were not fully prosecuted or fully carried forward, and admitted hostility to men and specifically to my client.

The relevance of all this is the way this whole thing came about. It's, basically, a report from Julie of what Avanee has said. And obviously in these circumstances there is great latitude for Julie picking up and running with something Avanee may have said and extrapolate from some statement into this is a sexual assault by grampa. And given the background here we think it's relevant to get into Julie's, her predisposition, her willingness to see sexual behavior or a sexual assault where maybe it doesn't exist, her willingness to

see something as bad behavior by my client or men where maybe it doesn't exist. And if this were sort of an easier situation where there had been a good relationship that my client and his daughter Julie had had, I guess an uneventful childhood, these matters wouldn't be of concern; but there is a long history of hostility, sexual assault, not following through with all that. We think it's important for at least the court to take a look at Julie's records and find out to what extent they me tell us more about her predisposition to find something that Avanee had said meant that Avanee was sexually assaulted.

Obviously there is a chain; we don't know if there is a direct question, but it's at least worth looking into, at least for the court to check in camera. If there is nothing there, there is nothing there. But if there is something that indicates she is predisposed to find sexual behavior in innocent behavior or find sexual meaning in innocent words --

THE COURT: Let me interrupt you. If I do this in camera, don't I make a call on the weight of the evidence? Don't I then become either an agent of the defense or an agent of the state? If I keep the evidence out and say there's nothing here, don't I become an agent of the state? Or on the contrary, if I say, yes, Mr. Rice, I agree, aren't I then making a determination as to the weight of the evidence when properly

that's for the jury to decide? Now, I understand there are some exceptions, but what are your thoughts about that?

MR. RICE: That's true, Your Honor. It's my understanding of the case law that that's the procedure, that in a situation like this we are not allowed just to get the records and then use them as we may. The court has to make, number one, an initial determination, is there enough in the background here to warrant an in camera review?

Number two, if there is an in camera review for which the court decides anything either I guess for the state or for the defense that is material or relevant, I realize it puts the court in that position; but I think it's my understanding from the case law that that's the process.

THE COURT: All right. Mr. Babbitt.

MR. BABBITT: Your Honor, this is clearly a State vs. Shiffra situation. I believe that's cited and the cite for that is in Mr. Rice's brief that accompanied his motions. The appellate courts have recognized that even having a Judge review a person's psychological or counseling records is still a significant invasion of privacy of that person's right to privacy.

THE COURT: All right. That may be true, that may be true that it's a significant invasion of privacy; but the

right of privacy has a balance and justice is the balance.

Without Julie's testimony that her daughter told her that grampa assaulted her, the essence of the crime, if Julie, the daughter, doesn't testify what happens to your case?

MR. BABBITT: We still have the videotape for the interview which was conducted by a social worker out of mother's presence, out of Julie's presence, so there still is a case there. But I don't believe that the defense has made the necessary preliminary showing that there is anything in the mental health or counseling records which would either affect Julie's ability to perceive events and accurately report them or that there are any inconsistent statements being made by Julie. Those are the only two areas where the appellate courts have allowed even an in camera review of a victim or, in this case, victim's mother's psychological records.

And it is the defense burden to set forth specific and precise facts that show that one of those areas is a concern, her ability to perceive and accurately report events or inconsistent statements. They haven't come even close on either of those two. So at this point I think the court needs to deny the motion without ordering an in camera review. I don't think the -- and Shiffra is directly on point here -- I don't believe the defense has made the necessary specific showing that there is anything

in these records that can be useful for the defense.

THE COURT: Is it the state's position then that where credibility is clearly an issue in this case with respect to Julie Groskreutz's credibility, that except in those two specific exceptions there cannot be, even if there is relevant evidence out there to attack her credibility, in a prior allegation of sexual assault would seem to have some relevance and relate to Julie Groskreutz's credibility, would it not?

MR. BABBITT: Yes, and we'll take that up under paragraph 7. I think the prior allegations of sexual assault do not go to whether or not her medical or counseling records should be reviewed by the court. That is something that we'll get into. And if the defense makes the necessary showing on the prior sexual allegations, then that does come in.

THE COURT: But it's, in 7 they are talking about the alleged victim's prior allegations. Here we're talking about mom's prior allegations. Credibility of the mom is crucial to the success of state's case.

MR. BABBITT: It's par 6. Yes, Your Honor, I made a mistake. I was looking at 7 and it's 6 that they want to use Julie's prior allegations of assault. That may be fair game but that doesn't open up her counseling records.

THE COURT: Rebuttal, Mr. Rice. It's your motion.

MR. RICE: I'm sure it's the problem in every case; we don't know what's in the records until we see them. If Mr. Babbitt's position is that we haven't shown that there is any inconsistency in the records, we don't know there is because we haven't seen them. Our position is that Julie Groskreutz has indicated in a number of ways that she's hostile to men, she's hostile to my client. If there is some admission in her counseling records that she's making up something or she made up the sexual assault allegations or these things aren't true, I guess that's where it would jump out from our perspective that there is inconsistency here.

There is an apparent acknowledged predisposition on her part to be suspicious of men and suspicious of my client. If there is something in her counseling or medical records that indicates that, yes, in fact, she made this up or made up the prior allegations or, in fact, what Avanee said was innocuous and she expanded it, that's what we'd like to find out. And that might be what's in her record but we don't know because we haven't seen them.

THE COURT: Realistically, do you think that's in the records?

MR. RICE: To be honest, Your Honor, I really don't know.

THE COURT: The court's satisfied that there has been a preliminary showing pursuant to State vs. Shiffra. Julie Groskreutz expressed in the record she didn't trust the child's father, she didn't trust her own father, she didn't perhaps trust men in general. I can't tell you the specific language, but I did read the transcript and there is something in there that alludes to a distrust for men. She has significant other background issues. The court's satisfied that there needs to be an in camera examination by the court.

Mr. Babbitt, you'll prepare the appropriate release, have those documents sent certified, return receipt, or other delivery that can reasonably assure confidentiality of the mail; or your client can procure those and send them and deliver them directly to the courthouse in Shell Lake and I will make the preliminary review. After I do that, we will seal the documents, they'll be made part of the record in the event somebody wants to appeal that ultimate decision that I make. After I review the documents, I will issue my decision as to whether they ought to be disclosed or not.

MR. RICE: Thank you, Your Honor.

THE COURT: Number 5.

MR. RICE: I think we've already covered that.

THE COURT: Conceded by the state?

MR. BABBITT: Medical records, yes. I don't concede the mental health records or counseling records.

THE COURT: Somewhere in the law I read something that even asking if there is a mental health record is a violation of the patient-counselor privilege. Tell me why I ought to order the guardian of the child to release those records.

MR. RICE: Well, I understood Your Honor to allow us to have my expert release a preliminary report based on the documentations we have including the videotape, the other documents the state has gathered. If we are getting medical records, that's fine.

As I said, I do understand that Avanee has been in counseling. If my expert's going to do, I guess, a complete exam at least on a preliminary basis, I don't see how we can exclude counseling records. I'm not sure what the distinction would be between mental health versus counseling necessarily in this context. If she's seeing a psychiatrist or psychologist --.

THE COURT: All right. Number 5 has been conceded with respect to the medical records. The court

conditionally grants disclosure of the mental health or counseling records.

Conditional grant is the same as that as provided in two, paragraph 2 or request number 2.

MR. RICE: Number 6, Your Honor, again we've submitted evidence that Ms. Julie Groskreutz has on at least two occasions accused men of sexually assaulting her. This would be cross-examination information. I've submitted an affidavit with documents from Barron County as to a charge that was brought and dismissed and also an affidavit from a Peter Suby, S U B Y, indicating that I believe in 1995 or '96 he was investigated in Olmstead county, Minnesota, contacted by an investigator, was advised that he had been accused of sexually assaulting Julie Groskreutz. Basically, at that point, beyond that point nothing was done. Whether it relates to Julie's failure to follow through or the Police Department or Julie's parents, I guess at this point we can't say exactly. But we think it's relevant information to bring out that on at least two occasions Julie Groskreutz has accused men of sexually assaulting her and then not pursued it to completion.

THE COURT: Mr. Babbitt.

MR. BABBITT: Clearly this is rape shield stuff, Your Honor. State vs. DeSantis is the Supreme Court case that

construes that statute and that is reported at 155 Wis.2d 774, 456 N.W. 2d 600. In that opinion Justice Abrahamson wrote, "We conclude that the defendant should produce evidence at the pre-trial hearing sufficient to support a reasonable person's finding that the complainant made prior untruthful allegations."

What we know today is that Julie Groskreutz made prior allegations. No person could find on the state of this record that they were untruthful. As such, they are barred by the rape shield statute.

THE COURT: Mr. Rice do you have to prove that they are truthful or untruthful?

MR. RICE: Well, I could certainly have at the trial Mr. Suby and Mr. Worman to testify directly. I haven't brought them here to testify about it today. We have their affidavits. I believe in Mr. Suby's affidavits he has denied the allegations and we could produce him at trial to testify about that, I guess. It's our request of the court that we be allowed to present that kind of evidence and provide it at trial.

THE COURT: Doesn't the rape shield apply only to the victim?

MR. BABBITT: I think it applies to every witness, Your Honor.

THE COURT: Mr. Babbitt, why did you dismiss

State vs. Sean Worman, 95 CF 89? That's probably an unfair question, Mr. Babbitt.

MR. BABBITT: I'm prepared to answer it, Your Honor. I don't even have to look back at the records to recall why that was the case. The situation involved 15-year-old Julie making allegations that Mr. Worman was having sexual intercourse with her. At that time he was 20 years old. She was a reluctant witness. She was placed on the stand at the preliminary hearing, basically said: I'm not going to testify; and left the courtroom without anyone's permission, including the Judge's. She was distraught. She did not wish to proceed further.

Getting to the truthfulness or untruthfulness of that, there is certainly no doubt in my mind or even the defendant's mind at that point because we discussed the situation that the allegations were true. We conceded that, but I think everyone understood my difficulty in proceeding at that time. That's why the case was dismissed.

THE COURT: Mr. Rice.

MR. RICE: Well, Your Honor, if we have to have a minitrial on whether, in fact, these allegations were true or false, we could spend a lot of time on that. If we're allowed to explore these issues, I can have Mr. Suby and Mr. Worman

testify that they were falsely concluded. Mr. Suby in his affidavit calls it a false allegation. I assume, without knowing for sure, but I assume Mr. Worman when he was brought into court on those charges did not admit them and, therefore, denied them. So, basically, the defendants would claim the allegations were false. I assume for the purpose of argument today that they would say it was false and Ms. Groskreutz would say they were true.

The point isn't convincing the jury necessarily and having a minitrial to prove one way or the other because we're not in a position to have a beyond a reasonable doubt criminal trial on these issues. But I think it's worthwhile for the jury to know that on two occasions Julie Groskreutz has accused men of sexually assaulting her and then not followed through with it. Either she was an unwilling witness or in one case the allegations were simply dropped and not pursued by the investigating authorities.

THE COURT: Does anybody have the cite for the rape shield act?

MR. BABBITT: 972.11, Your Honor.

THE COURT: Thank you. Who is the complaining witness here?

MR. BABBITT: Avie.

THE COURT: 972.11(2) talks about complaining witness. The exceptions are evidence of prior untruthful allegations of sexual assault made by the complaining witness. The child hasn't made any other prior allegations.

MR. BABBITT: — Correct.

THE COURT: I will grant the motion. It doesn't appear that 972.11, if the child is really the complaining witness which I doubt very much is the case, there cannot be any evidence introduced as to her prior sexual conduct or reputation. Mom, if mom is not considered the complaining witness, then the rape shield act doesn't apply to her. If she is construed as a complaining witness -- and that's really who the complaining witness here is, it's the mother, it's not this three-year-old child. The three-year-old child isn't the complaining witness. There appears to be an exception to mom. Evidence of prior untruthful allegations of sexual assault made by the complaining witness is the exception to the rape shield act. I think it comes in, in either analysis. You are not going to introduce any other evidence about the prior sexual contact of the three-year-old child because I'll keep that out. That's my ruling. Motion's granted.

MR. RICE: Thank you, Your Honor. 7, Your

Honor, was really a request for clarification. If there are other statements, I didn't know at the time I drafted this whether there were other videotapes or other statements that Mr. Babbitt might be using.

THE COURT: Isn't this really a matter of discovery?

MR. RICE: It is, Your Honor.

THE COURT: All right. Has there been a supplementary disclosure on discovery, Mr. Babbitt?

MR. BABBITT: I believe I've utilized the open file policy to provide Mr. Rice with everything I have. I believe the entirety of statements we would use from Avie are included in those reports or in the videotapes.

THE COURT: All right. I'm satisfied that the District Attorney's office has. . .

STATE OF WISCONSIN CIRCUIT COURT
BARRON COUNTY

State of Wisconsin,	)	TRANSCRIPT OF
Plaintiff,	)	PROCEEDINGS
vs.	)	Motion Hearing
Charles Groskreutz,	)	
Defendant.	)	Case No. 01 CF 44

The above-entitled matter came duly on for hearing before the Honorable Eugene D. Harrington, Circuit Judge for Washburn County, on January 9, 2002, at the Barron County Courthouse, Barron, Wisconsin.

Before and reported by Karlye A. Canfield, Registered Professional Reporter, Certified Merit and Realtime Reporter, Notary Public for the State of Wisconsin.

REALTIME COMPUTER TRANSLATION

APPEARANCES:

JAMES BABBITT, Assistant District Attorney, Barron County Courthouse, Barron, WI, appearing for and on behalf of the State.

DAVID RICE, Attorney at Law, PO Box 167, Eau Claire, WI, appearing for and on behalf of the Defendant.

Defendant appearing in person.

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EXHIBITS

MARKED RECEIVED

(No exhibits marked)

(Proceedings held as follows:)

THE COURT: Mr. Groskreutz appears in person with Mr. Rice. Mr. Babbit appears on behalf of the state. This is the time scheduled for defendant's motion in limine. Mr. Rice.

MR. RICE: Thank you, Your Honor. I brought this motion for the court's attention to the question of Julie Groskreutz's testimony. We're asking the court to order that, I guess it's suppression of her testimony or that she not be allowed to testify. Basically, I'm advised that, by Mr. Babbitt that Ms. Groskreutz will not sign the authorizations or provide the records of her medical and/or psychiatric history that the court was going to examine in camera pursuant to the court's

previous order. So assuming that's the case, that she will not provide that information to the court for its in-camera review, then the remedy, it's my understanding, under State vs. Shiffra is for the court to order that Ms. Groskreutz, in this case Ms. Groskreutz's testimony may not be used by the state.

Basically, Shiffra indicates that if a witness or a complainant is ordered to provide that kind of information for an in-camera review and will not do so, the remedy again is suppression. There is really no remedy for contempt or that sort of sanction, so we're asking the court to impose that remedy and order that the state may not use Ms. Groskreutz's testimony based on her refusal to submit those records to the court.

THE COURT: Mr. Babbitt.

MR. BABBITT: Your Honor, I have three reasons in opposition to the defense motion. First of all, in order to preserve my record, I have to continue to challenge the basis for ordering the in-camera inspection. In the first place, I do not believe the defense has made a sufficient showing. I reiterate that as I say again merely for record purposes. That was fully argued at an earlier hearing.

My other two new arguments is, first of all, Julie is not the victim. State vs. Shiffra goes to the victim of the testimony,

as she is the mother of the alleged victim here.

My third reason is that Julie, that is, will not be testifying about anything other than information that can be directly corroborated by others. Namely, she would testify that the alleged victim was in the care of the defendant at the time the alleged touching took place and that Avie reported to her that Avie was inappropriately touched. Of course, there will be other witnesses that will corroborate the fact that Avie reported to them that Avie was inappropriately touched.

THE COURT: If I partially grant the motion in that I preclude Julie -- is it Julie Groskreutz?

MR. BABBITT: Yes.

THE COURT: Julie Groskreutz from testifying what the child told her and then what she related somewhere else, doesn't that satisfy the issue of fairness here, counsel?

MR. RICE: From our perspective, yes, Your Honor. Much of the case relies on what Ms. Groskreutz, Julie Groskreutz has to say about what her daughter said to her allegedly about what happened. The only two people present were Julie and Avanee. And if Ms. Groskreutz is allowed to testify about what her daughter said or allegedly said or what was meant or the tone of voice --

THE COURT: Mr. Rice, let me present the way

I'm looking at this. The state wants to have Ms. Groskreutz testify two things; one, opportunity is essentially what it is; and second, excited utterance. It happened. If I grant your motion in limine precluding Ms. Groskreutz from testifying but only preclude her from testifying as to the excited utterance portion of this, the state still can present other witnesses presumably to verify it happened. The child, the small child said it happened, and the state's case goes forward and then the jury decides the issues on the best evidence it can get. I do not see that Ms. Groskreutz' refusal to sign all these disclosures and conditionally tender information to this court, I don't see that her credibility is significant with respect to opportunity. Am I being clear?

MR. RICE: I think I agree, Your Honor, that if her testimony is limited to: This evening my daughter was with her father, such and such a time under these circumstances, I don't know that that touches on the more problematical question of what did the daughter say when and under what circumstances. So if the court is limiting her testimony to those sort of surrounding circumstances of time and place and location, I guess I understand the court's position and I think to a certain extent that's not a problem from our perspective if that's all she's testifying about.

THE COURT: Mr. Babbitt.

MR. BABBITT: I concur.

THE COURT: I want this order to be clear. I think Mr. Rice would like me to enter an order limiting Ms. Groskreutz's time to only a specific set of circumstances, opportunity. But what I -- thereby eliminating all other possible avenues of inquiry or testimony. And my order is contrary to that.

Ms. Groskreutz -- I'm granting the motion in limine to a very limited extent -- Ms. Groskreutz cannot testify about any conversation she had with the alleged victim Avanee that relates to the relationship between Avanee and the defendant on any, on the underlying allegations of this criminal complaint.

The state has the right to introduce other relevant testimony from Ms. Groskreutz. Mr. Babbitt, do you, does the state anticipate -- and I'm sorry I have to do this, I'm going to make you show your cards a little bit -- is the state going to use Ms. Groskreutz for anything other than opportunity and then, up until now when I granted this partial motion or partially granted the motion in limine, he did it?

MR. BABBITT: No, I don't think there is anything else she could testify to, Your Honor.

THE COURT: So do you understand the parameters and the ruling, Mr. Rice?

MR. RICE: I think so, Your Honor. As I understand it, Julie may not testify about anything, any conversation she had with Avanee or anything Avanee said to her about Avanee's relationship to my client or relating to the basic underlying allegations. Is that –

THE COURT: Correct.

MR. RICE: That's what I wrote down.

THE COURT: But opportunity is fair inquiry.

MR. RICE: Okay. I think I understand it.

THE COURT: Mr. Babbitt.

MR. BABBITT: I understand it as well, Your Honor.

THE COURT: We're prepared to go to trial then in about a month, month and a half or . . .